NO. 96189-1

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER,

Respondent,

v.

CITY OF EVERETT and DEPARTMENT OF LABOR & INDUSTRIES,

Petitioners.

SUPPLEMENTAL BRIEF DEPARTMENT OF LABOR & INDUSTRIES AND CITY OF EVERETT

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I. INTRODUCTION

Res judicata and collateral estoppel protect workers, employers, and the Department of Labor & Industries from relitigating settled issues about whether a worker should receive industrial insurance benefits. Despite the Board of Industrial Insurance Appeals issuing a final order denying Michael Weaver's occupational disease claim, he filed a second claim alleging the same workplace exposure caused the same medical condition. He argues preclusion does not apply because he misjudged his claim's value. But the finality of a decision to allow or reject a claim does not turn on the value of the eventual benefits that L&I or a self-insured employer may later provide. Were this true, allowance decisions would be vulnerable whenever the worker or employer realizes that an injury has turned out to be more disabling (and expensive) than anticipated.

This undermining of finality would affect the approximately 109,000 new L&I claims filed each year, as well as existing claims.[1] And it would disproportionately hurt workers as L&I allows about 85 percent of filed claims.[2] To protect finality, L&I and the City of Everett ask this Court to reverse the Court of Appeals and affirm the superior court.

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[1] Dep't of Labor & Indus., *Comprehensive Annual Financial Report* 122 (2017), https://www.lni.wa.gov/ClaimsIns/Files/StateFundFinancial/2017CafrRpt.pdf.

[2] *See Comprehensive Annual Financial Report* 122.

II. ISSUE

The Board ruled that Weaver's workplace exposure did not cause his malignant melanoma. Weaver appealed but then dismissed his superior court appeal. Do res judicata and collateral estoppel preclude him from rearguing the same subject matter and issue in a second case when the only difference is that Weaver's rejected condition has worsened?

III. STATEMENT OF THE CASE

A. Overview of Applicable Workers' Compensation Principles

RCW Title 51 provides the procedures for opening a claim and limits Board review of an L&I order denying claim allowance.

1. To open a claim, a worker files an accident report that does not ask for specific benefits

Workers may file workers' compensation claims for industrial injuries and occupational diseases. RCW 51.28.020, .050, .055; RCW 51.32.010, .180. A worker files an accident report to apply for an injury or occupational disease claim. RCW 51.28.020; WAC 296-15-405; AR 250, 269.[3] The accident report does not allow a worker to ask for specific benefits, instead the worker provides information about the injury or occupational disease, the worker's employer, the worker's family size, and the worker's doctor, and the employer provides wage information. AR 250, 269. L&I and the self-insured employer use this background information to adjudicate the claim.

[3] *See* Dep't of Labor & Indus., *Filing Your Claim*, https://www.lni.wa.gov/ClaimsIns/Claims/File/FilingClaim/default.asp (last visited Jan. 23, 2019).

A worker must file an occupational disease claim within two years of notification of the occupational disease. RCW 51.28.055. The worker files only one accident report to open a claim, and L&I assigns one claim number for the claim. *See* WAC 296-15-405.

If L&I allows a claim, it will pay eligible benefits on the claim. But before it addresses what benefits are due, L&I first issues an order on claim allowance, after determining that the claim was filed before the statute of limitations expired, that there was an industrial injury or occupational disease, that the claimant was in the course of employment when injured, that the claimant is a worker, and that the claimant was engaged in covered employment. RCW 51.08.100, .140, .180; RCW 51.12.020; RCW 51.28.050, .055; RCW 51.32.010.

2. In an appeal of a claim denial order, the Board reviews claim allowance, not what benefits to award

If a worker or employer does not appeal an allowance or rejection order, it is final. RCW 51.52.050; *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994). Workers (including firefighters like Weaver) and employers can contest L&I's claim allowance and claim denial decisions to the Board. RCW 51.52.050, .060. And a firefighter may recover expert witness costs and attorney fees if successful. RCW 51.32.185(9)(a). Firefighters are entitled to a presumption that certain

conditions, including malignant melanoma, are occupational diseases. RCW 51.32.185. Under the presumption, if the firefighter proves he or she is a qualified worker who filed within the statute of limitations, a firefighter is entitled to a presumption that the malignant melanoma was an occupational disease that arose naturally and proximately out of employment. *Id.*

Review at the Board is de novo, and parties may introduce evidence about L&I orders not before L&I. RCW 51.52.100, .102. But when parties litigate a claim allowance or denial order, the case does not involve arguments about particular benefits because the only issue is allowance of the claim. *See Ronald Spriggs*, No. 07 24270, 2009 WL 1504259, at *9 (Wash. Bd. Indus. Ins. Appeals Mar. 24, 2009); *Darlene Ross*, No. 88 4379, 1990 WL 127259, at *1 (Wash. Bd. Indus. Ins. Appeals July 23, 1990).[4] Because the Board may only consider issues decided in an L&I order (here, denial), the Board cannot consider what benefits to award if it decides that L&I should have allowed the claim. *Id.* When the Board directs L&I to allow a claim, it returns the case to L&I to decide how to calculate benefits and what to award. *See Spriggs*, 2009 WL 1504259, at *9.

[4] *See also John Strack*, No. 17 14807, 2018 WL 4377209, at *1 (Wash. Bd. Indus. Ins. Appeals Aug. 8, 2018).

A party must appeal a Board order, or it becomes final. RCW 51.52.110.

3. After a claim is opened L&I decides benefits and after it is closed a worker can apply to reopen for worsening

After L&I's decision to allow a claim, the worker becomes eligible for benefits under the Industrial Insurance Act. RCW 51.32.010, .180.[5] L&I then decides whether the worker needs proper and necessary treatment, and whether temporary total disability (time loss) and vocational benefits are appropriate. RCW 51.32.090, .095, .099; RCW 51.36.010; WAC 296-20-01002. When the worker completes all necessary treatment and the worker's condition is "fixed," L&I decides whether the worker should receive either permanent partial disability or permanent total disability (pension) benefits. RCW 51.32.055, .060, .080. It then closes the claim. But L&I may consider these benefits only in allowed claims.

After an allowed claim is closed, a worker can seek to reopen it if the worker's condition worsens—no matter how little the award of benefits or type of benefits awarded when the claim was open. RCW 51.32.160; *Lindsey v. Dep't of Labor & Indus.*, 35 Wn.2d 370, 371-74,

[5] While a claim application is pending before an allowance decision, workers may receive time loss and treatment on a non-binding, provisional basis. RCW 51.32.210.

213 P.2d 316 (1949). To reopen, the worker need not prove the elements of claim allowance again, but only that the worker's medical condition has objectively worsened. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 432, 858 P.2d 503 (1993).

B. The Board Determined in a Final Order That Weaver's Work Did Not Cause His Malignant Melanoma

1. In Weaver's first case, he said he covered up in the sun and was only sunburnt once at work

In June 2011, a biopsy of a mole on Weaver's back revealed a malignant melanoma. AR 303. This was a "high risk melanoma," and Weaver's oncologist, David Aboulafia, MD, observed that "this is a cancer that has potential for spread[ing]" and that Weaver's "fairly significant cancer diagnosis . . . could affect his longevity." AR 127, 284. The next month, a surgeon cut out 16 square inches of skin from Weaver's back. AR 131.

Weaver applied for industrial insurance benefits for his malignant melanoma. AR 250. In January 2012, L&I denied the application because it determined that the melanoma was not work related. AR 278. Weaver appealed to the Board. AR 252. Because L&I had not issued an order regarding Weaver's eligibility for time loss or other benefits, the Board considered claim allowance only. AR 251, 253, 263-64. Thus, the Board

could rule only on whether, after applying the presumption, Weaver's condition was an occupational disease. AR 253, 263-64; RCW 51.08.140; RCW 51.32.185.

At the hearing before the Board, Weaver was represented by an attorney who has litigated several firefighter occupational disease cases, including ones involving malignant melanomas. *E.g.*, *Larson v. City of Bellevue*, 188 Wn. App. 857, 355 P.3d 331 (2015), *aff'd*, 187 Wn.2d 716, 389 P.3d 504 (2017); *overruled on other grounds by Clark County v. McManus*, 185 Wn.2d 466, 372 P.3d 764 (2016); AR 252. At the hearing, the City presented medical evidence that Weaver developed malignant melanoma because of his skin, hair, eye color, and history of unrelated sunburn, not work. AR 258-61. Weaver countered that his sun exposure before working for the City was not as extensive as the City's experts said. AR 379, 381. After his attorney asked about sun exposure at work for the City, he reported that he was only sunburnt once at work. AR 264, 377-78, 381. He also reported learning to cover up as a child and in other employment, and then as a firefighter "[w]hen I would take my shirt off, I always would stay covered up and use sunscreen." AR 379-81.

Weaver presented medical testimony that his occupation as a firefighter exposed him to chemicals, causing his malignant melanoma.

AR 256-57, 357. Kenneth Coleman, MD, testified this exposure caused the melanoma, citing 12 medical journal articles. AR 329-57. Dr. Coleman has testified in other cases in which the worker has proven that firefighting caused melanoma. *E.g.*, *Larson*, 188 Wn. App. at 863.

2. The Board found that sun exposure causes melanoma, but that it did not cause Weaver's malignant melanoma

In its decision affirming L&I, the Board recognized that sun exposure causes melanoma and found that Weaver's firefighting work exposed him to sun. AR 262-65. In accordance with Weaver's testimony, the Board found he suffered one slight burn at work. AR 264-65. But it ruled that neither the sun exposure at work nor fumes during firefighting caused Weaver's melanoma. AR 262, 264-65.[6]

Weaver appealed to superior court but then stipulated to dismissal of his appeal. AR 266.

C. After the Cancer Recurred, Weaver Filed a New Workers' Compensation Claim, but L&I, the Board, and the Superior Court Agreed He Could Not Relitigate Whether His Occupation Caused the Malignant Melanoma

1. Weaver's cancer spread, and the medical testimony established it was the same malignant melanoma

In January 2014, a medical exam showed that Weaver's cancer had

[6] The Board did not reach whether Weaver's melanoma arose naturally out of his employment. RCW 51.08.140. To show the "naturally" prong about sun exposure, Weaver would have had to show that sun exposure was distinctive to his employment. *See Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987).

spread to his brain, and he later filed a second accident report to apply for a workers' compensation claim. AR 269, 319. L&I rejected the application because it involved the same cancer that the Board had already decided was not caused by Weaver's work. AR 281.

Weaver appealed to the Board, and the City moved for summary judgment, arguing that collateral estoppel and res judicata precluded the new claim. AR 63-65, 229-45. All medical evidence showed that the cancer in Weaver's second occupational disease claim was the same cancer as in the original claim, now metastasized: "[t]he recently diagnosed brain lesions were metastases from the original cutaneous melanoma." AR 297 (Hackett); *accord* AR 129 (Aboulafia), 137-38 (Brodkin), 196 (Coleman), 285 (Levenson).[7] As Dr. Levenson explained, they were not "a new primary cancer and are the same cancer (malignant melanoma)" as originally found on his back. AR 285.

2. Weaver claimed the same exposure period—the time before his first claim—in his second claim

Weaver argued in the second case that sun exposure at work had caused the malignant melanoma. AR 188-89. One of his doctors offered a

[7] Weaver agreed at the Board that it is "undisputed" his current condition "metastasized from the melanoma." AR 43, 181. Metastasis means "a growth of . . . abnormal cells distant from the site primarily involved by the morbid process." *Dorland's Illustrated Medical Dictionary* 1144 (32d ed. 2012).

new history of this exposure, concluding that Weaver's malignant melanoma was caused by intermittent exposure to ultraviolet radiation from sunlight as a firefighter from 1996 to 1998 and in the early 2000s. AR 137-44. This was the same period in the first case that the Board found, based on Weaver's testimony, he was only slightly sunburnt once at work and that sun exposure at work did not cause the cancer. AR 262-65, 264, 377-78, 381.

Weaver presented no evidence that his cancer metastasized into his brain because of any additional occupational exposure after the rejection of his original claim. He also presented no evidence that the cancer in his brain was a new primary cancer, and not a metastasis of the melanoma.

3. The Board and superior court ruled that the two cases had the same claim, barring relitigation

The Board granted summary judgment to the City and affirmed L&I's order. AR 3, 57-60. The superior court affirmed, ruling that the first and second cases were the same, precluding the appeal. CP 17-18, 76-77. The Court of Appeals reversed. *Weaver v. Dep't of Labor & Indus.*, 4 Wn. App. 2d 303, 336, 421 P.3d 1013 (2018).

IV. ARGUMENT

A party must appeal an L&I or Board order, or it becomes final.

RCW 51.52.050, .110. For over 80 years, the Court has held that workers' compensation agency orders have preclusive effects. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997); *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163-64, 34 P.2d 457 (1934).[8] Res judicata and collateral estoppel ensure the finality of agency decisions, which benefits workers, employers, and L&I. Finality advances the policy of ending disputes, ends strife, promotes judicial economy, and prevents harassment of and inconvenience to litigants. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993); *Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949). Failing to give preclusive effect to claim allowance decisions would lead to uncertainty and strife for workers, L&I, and employers.

A. Res Judicata Bars Weaver's Attempt to Relitigate Allowance Because the Cases Involve the Same Subject Matter: Whether Weaver's Melanoma Is an Occupational Disease

The Court's long-established principles govern this case. Once a claim rejection order becomes final, a worker may not file another claim for the same injury or occupational disease. *Marley*, 125 Wn.2d at 537. "Res judicata applies where the subsequent action involves (1) the same

[8] *See also Marley*, 125 Wn.2d at 537; *McCarthy v. Dep't of Soc. & Health Servs.*, 110 Wn.2d 812, 823, 759 P.2d 351 (1988); *Le Bire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 419-20, 128 P.2d 308 (1942); *Ek v. Dep't of Labor & Indus.*, 181 Wash. 91, 94, 41 P.2d 1097 (1935).

subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons…." *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730, 254 P.3d 818 (2011). Res judicata precludes "claims and issues that were litigated, or might have been litigated, in a prior action." *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

Weaver argues that res judicata does not apply because his two cases allegedly involve different subject matters.[9] In deciding subject matter, courts look at the "nature of the claim or cause of action," considering the theory of recovery. *Hayes v. City of Seattle*, 131 Wn.2d 706, 712, 934 P.2d 1179 (1997); *Marshall v. Thurston Cty.*, 165 Wn. App. 346, 353, 27 P.3d 491 (2011). This shows that res judicata applies here.

1. The claims have the same subject matter because the nature of the claims is the same: same exposure, same condition, and same relief

In both cases, the nature of the claims was the same:

Same work exposure. The sun exposure Weaver's doctor relies on in the second case occurred before Weaver filed his first 2012 accident report—from 1996 to 1998 and the early 2000s. AR 139-44. These facts

[9] Weaver also incorrectly argues the Court need not consider the res judicata claim because it is a "repackaged collateral estoppel argument." Ans. to City Pet. 4. Not so. The precluded claim is whether Weaver has an occupational disease—the same cause of action as his second claim, with the same parties. The issue litigated within that claim is whether the work exposure caused the medical condition. The doctrines overlap.

were allegeable in his first 2012 case, and his attorney in his first case asked about and Weaver testified his sun exposure at work. AR 377-78.

Same medical condition. As Weaver agreed, the 2011 and 2014 occurrences of Weaver's cancer are the same disease. AR 43, 181. He admitted at the Board that it is "undisputed" his current condition "metastasized from the melanoma." AR 43, 181. He therefore argues for application of the firefighter presumption that malignant melanoma is presumed an occupational disease. AR 43, 180-81; RCW 51.32.185(3). Weaver's concurrence about the metastasis reflects the medical opinion that there was no new primary cancer, and the cancer in his brain is the same malignant melanoma from 2011. AR 129, 137-38, 196, 285, 297. Weaver has not rebutted the medical evidence that the 2014 spread of his cancer was the same malignant melanoma.[10] And his medical witnesses

[10] If Weaver had different diseases with distinct pathologies and latency periods because of the same occupational exposure, he could maintain the second claim. *See Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 229, 883 P.2d 1370 (1994). But here the opposite is true: the medical opinion is that Weaver's current condition is part of the malignant melanoma—it spread. AR 129, 137-38, 196, 285, 297. Under *Kilpatrick*, whether a new medical problem is a continuation of the original illness or a separate disease turns on whether the new problem arose out of the original illness or whether it is a new illness that happens to have arisen out of the same occupational exposure. 125 Wn.2d at 230-31. Since Weaver's current illness is part of his original disease, it is part of the same disease process. To show differently, Weaver would have to present medical testimony supporting such an argument. *See Parr v. Dep't of Labor & Indus.*, 46 Wn.2d 144, 145, 278 P.2d 666 (1955). He did not.

agreed it was a metastasized cancer. AR 129, 137-38, 196.[11]

Same relief. There is also the same theory of recovery. This is because the same relief was at issue in both cases: whether L&I should allow the claim—that is, whether the disease is an occupational disease. AR 59, 263-64.

2. The two cases were not time loss or pension cases because L&I only decided to reject Weaver's claim and the Board could not decide time loss or pension issues

To support its theory that Weaver's first case and second case at the Board involved two different subject matters, the Court of Appeals believed that L&I ruled on temporary total disability benefits (time loss) in the first case and permanent total disability benefits (pension) in the second case. *Weaver*, 4 Wn. App. 2d at 323. This is not correct. Although Weaver might have ultimately wanted those benefits, he filed an accident report to open his claim and L&I ruled only on whether to allow his occupational disease claim. It did not reach what benefits to authorize.

Claim allowance involves consideration of several factors. Once L&I allows a claim, the worker need not reprove the allowance elements when it comes time to award benefits like time loss or a pension. But in

[11] In his answer, he characterizes the first case as "the melanoma" and the second case as "brain cancer." Ans. to City 8. But at the Board, superior court, and Court of Appeals, he conceded that the second incidence of cancer was the metastasized melanoma, and this is the undisputed expert medical evidence. AR 43, 181; CP 23; Appellant's Br. 1, 5.

deciding whether to allow an occupational disease claim, L&I decides whether (1) the application was timely, (2) the claimant qualifies as a worker, (3) the claimant is in covered employment, and (4) the claimant has a medically provable condition that arises naturally and proximately out of employment. RCW 51.08.140, .180; RCW 51.12.020; RCW 51.28.055; RCW 51.32.180. Each element must be satisfied and the claim allowed before the worker is eligible to receive any type of benefit.

But the extent of Weaver's disability (meaning whether his condition was serious enough to warrant time loss or a pension) was not an element necessary to determine allowance. Instead, L&I only needed to find that Weaver's condition arose naturally and proximately out of employment because the distinctive conditions of employment proximately caused a medical condition. *See* RCW 51.08.140; *Dennis*, 109 Wn.2d at 477, 481. The allowance issue was not whether the medical condition warranted a certain benefit, but whether a medical condition caused by occupational exposure existed at all.

Because L&I decided only the threshold question and denied allowance, Weaver could not get relief in his appeal to the Board beyond consideration of the claim denial question. This is because the Board only has appellate authority over L&I orders and cannot expand the scope of

the litigation. *Karniss v. Dep't of Labor & Indus.*, 39 Wn.2d 898, 901-02, 239 P.2d 555 (1952); *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994); *Spriggs*, 2009 WL 1504259, at *9. The Board "review[s] the specific Department action" from which the party appealed. *Kingery*, 132 Wn.2d at 171. In *De Fraine*, the trial court reversed an order denying a claim and then went on to award time loss. *De Fraine v. Dep't of Labor & Indus.*, 180 Wash. 504, 513, 40 P.2d 987 (1935). The Court reversed the time loss award because L&I had not ruled on the issue. *Id.* When the Board reverses an allowance decision, it remands the case to L&I to determine what benefits to award. *Spriggs*, 2009 WL 1504259, at *9; *see also Ross*, 1990 WL 127259, at *1.

This authority shows that in Weaver's two cases the Board faced an identical claim and identical possible relief. The Board could only reverse L&I's rejection order because the order addressed claim rejection only. The Board could not grant time loss or any other relief except allowance. So, contrary to the Court of Appeals' and Weaver's theories, the first case at the Board was not about time loss and the second case was not about a pension. They were each about one issue and one issue only: whether he had an occupational disease. The subject matter is the same.

3. The two cases involve the same subject matter because the claim was ripe at the time of the first case

Weaver's claim that he had an occupational disease was ripe at the time of the first case and was in fact litigated. Citing *Mellor v. Chamberlin*, 100 Wn.2d 643, 646-47, 673 P.2d 610 (1983), Weaver argues that res judicata does not apply because the "events underlying the relief sought in the second claim had not yet occurred at the time of the first." Ans. to City at 5. But in *Mellor*, res judicata did not apply because the party had not suffered damages at the time of the first case, so the action was not ripe. 100 Wn.2d at 647. By contrast, Weaver's claim was ripe in 2012 when L&I ruled on his first application. His cancer was already present.

More information about the progression of the cancer in 2014 does not affect whether Weaver's claim was ripe in 2012. It does not matter that his condition in 2014 may have led to a pension and that his condition in 2011 would not have supported a pension. What type of benefits a worker receives goes to the extent of a worker's disability, which the Board does not consider in determining allowance. *See Ross*, 1990 WL 127259, at *1.

Weaver points to the "reality" that what he wanted was time loss in the first case and a pension in the second. Ans. to City 14. But this goes only to Weaver's personal motivations, which do not create two subject

matters. A worker's personal motivation to receive a type of benefit does not transform the objective nature of a claim allowance decision. The Legislature decides the elements of a claim, not a party. *See Lehiten v. Weyerhaeuser Co.*, 63 Wn.2d 456, 457, 387 P.2d 760 (1963) (industrial insurance is statutory system); *State v. Williams*, 162 Wn.2d 177, 183, 170 P.3d 30 (2007) (Legislature decides statutory elements). While time loss might have been Weaver's chief concern when he filed his original accident report, that did not convert his Board case into a "time loss case."

Although Weaver argues that the fact that his condition worsened is legally significant, the Legislature specifies how to handle a worsened medical condition, and this does not entail revisiting allowance. If L&I allows a claim and later closes it, the worker can apply to reopen the claim and receive additional benefits if the worker's condition worsens. RCW 51.32.160. So the Legislature has provided a process for worsening, retaining the distinction between the decision of whether to allow a claim and the decision of what benefits a worker is entitled to in an allowed claim.

Because the Legislature has contemplated the worsening of a medical condition as part of an allowed claim, a worsening does not create a different subject matter. Because this eventuality was contemplated in Weaver's first case, res judicata bars his second.

B. Collateral Estoppel Bars Relitigating the Same Issue: Whether Sun Exposure at Work Caused the Malignant Melanoma

"When the Board's ruling [on allowance] is not appealed, the parties are collaterally estopped from relitigating the Board's ruling in a subsequent action." *McCarthy*, 110 Wn.2d at 823. Despite this holding, the Court of Appeals found no collateral estoppel under the doctrine's fourth injustice prong. *See Weaver*, 4 Wn. App. 2d at 316.[12] But Weaver received a fair opportunity to litigate whether his melanoma was an occupational disease, and he may not relitigate that issue now.

1. Weaver fully litigated whether his malignant melanoma was an occupational disease

The procedural fairness of the first Board proceeding allows a just application of collateral estoppel. When considering the injustice prong of this doctrine, the Court looks to the procedural fairness in the first case. *Schibel v. Eymann*, 189 Wn.2d 93, 102, 399 P.3d 1129 (2017). The "injustice element is most firmly rooted in procedural unfairness. Washington courts look to whether the parties to the earlier proceeding

[12] "For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied." *Christensen v. Grant Cty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). There is no dispute that the City and L&I proved the first three elements.

received a full and fair hearing on the issue in question." *Schibel*, 189 Wn.2d at 102 (quotations omitted). Applying this principle in *Reninger v. Department of Corrections*, this Court held that collateral estoppel applied when the party was "afforded and took advantage of numerous procedures" such as having counsel who called witnesses and cross-examined the State's witnesses, obtained documents, and conducted depositions. 134 Wn.2d 437, 451, 951 P.2d 782 (1998).

As in *Reninger*, Weaver received a full hearing in the first case, calling five witnesses, cross-examining the employer's witnesses, submitting exhibits, and providing briefing. AR 252-64, 296, 328; RCW 51.52.100, .140. There is no indication of procedural unfairness, and he fully litigated the matter. Specifically, he called a medical witness, Dr. Coleman, who testified that his malignant melanoma was caused by his firefighting. AR 357. Dr. Coleman has testified in other cases in which the worker has proven that firefighting caused melanoma. *E.g.*, *Larson*, 188 Wn. App. at 863. Apparently disagreeing with the caliber of this witness, the Court of Appeals quibbled over Weaver's initial decision not to call an oncologist—speculating that this was for monetary reasons, even though a successful firefighter would recoup expert costs. RCW 51.32.185(9)(a).[13]

[13] Weaver's assertion about the amount of money he paid his medical witness to testify in the second case is not found in the record. Ans. to L&I 8.

But if the proceeding is fair, a strategic choice about a witness or lines of questioning should not govern whether collateral estoppel applies.

The Court of Appeals asks L&I and the Board to engage in an in-depth evidentiary analysis to determine whether collateral estoppel applies by examining the type and cost of witnesses, the possible benefits if the claim is allowed, and seriousness of the condition. This is inconsistent with reducing economic suffering and providing sure and certain relief because it requires parties to litigate claim allowance at the Board with a heavy evidentiary burden and with evidence that is speculative and also not relevant or admissible on the issue of claim allowance. RCW 51.04.010; RCW 51.12.010.

2. Since allowance is the gateway to benefits, incentive exists to litigate whether work caused a condition

Contrary to Weaver's arguments, *Hadley* does not support finding injustice here. Ans. to L&I 7-9 (citing *Hadley v. Maxwell*, 144 Wn.2d 306, 27 P.3d 600 (2001)). In *Hadley*, the Court found injustice in applying collateral estoppel because there was no incentive in the first proceeding to fully litigate a traffic infraction with a nominal $95 penalty. *Hadley*, 144 Wn.2d at 309, 315. The Court explained that collateral estoppel is not appropriate "when there is nothing more at stake [in a first proceeding] than a nominal fine." *Id*. at 315.

Weaver points to his desire to obtain time loss in the first case and a pension in the second to argue the first case involved only a minor claim with nominal relief that gave him a low incentive to litigate. Ans. to L&I 8, 14, 18-19. *Hadley* does not apply here because Weaver, unlike Hadley, fully litigated the matter by presenting medical and other evidence to support his claim. And he did this because a worker has every incentive to fully litigate the allowance of an occupational disease claim. The legal stakes in an allowance case differ vastly from a nominal fine in a traffic infraction case. Allowance is the gateway to all benefits: treatment, time loss, vocational services, permanent partial disability, pension benefits, and survivor's benefits. RCW 51.32.050, .060, .067, .080, .090, .095, .099; RCW 51.36.010. Access to these benefits is not nominal.

And, in any event, the type and dollar value of benefits was not at issue at the Board, only the threshold question of whether he had an occupational disease. Reversal of L&I's claim denial order was the only relief available in the first case and second case. Weaver's subjective beliefs about the potential value of benefits he might ultimately receive are irrelevant because the Board could not order those benefits in either case action. In determining the stakes of a legal proceeding, courts do not look to a party's personal, background motives for filing the action; instead,

they look to the character of the legally available relief directly stemming from that action. *E.g.*, *Sprague v. Spokane Valley Fire Dep't*, 189 Wn.2d 858, 903, 409 P.3d 160 (2018). Indeed, if a subjective standard applied, seemingly final judgments would often be set aside because disappointed litigants who misvalue a case could always argue that they lacked motivation in the first proceeding.

Objectively, a proceeding about opening a claim is always significant no matter how minor the injury initially presents because conditions often get worse. Such a proceeding is never a trivial proceeding like a traffic ticket case. For example, in *Lindsey* the worker initially had a bruise and his claim was allowed, and after he received a week of time loss, his claim was closed; then, 11 months later he suffered a stroke, significantly worsening his condition. 35 Wn.2d at 371. Under Weaver's analysis, the employer would have been able to contest reopening because the worker's condition initially was minor. But in reality, when Lindsey's claim was opened it was not for something trivial, instead it was for the ability to reopen his claim if it worsened. And indeed L&I handles many claims where the initial condition seemed small, like a back strain, and it worsened. The objective nature of the workers' compensation system, which accounts for worsening, controls here.

Building on his subjective knowledge theme, Weaver argues that he did not know that a final Board decision would preclude future benefits. Ans. to L&I 13-14, 18. Even assuming a person's knowledge about the consequences of not appealing is relevant, RCW 51.52.110 gives notice that unappealed Board decisions are final. *See Dellen Wood Prod., Inc. v. Dep't of Labor & Indus.*, 179 Wn. App. 601, 629, 319 P.3d 847 (2014) (statute gives notice). And RCW 51.32.160 gives notice that L&I must allow a claim for a worker to receive benefits for a worsened condition. Ignorance of these statutes' ramifications does not defeat finality. *See Dellen*, 179 Wn. App. at 629. Collateral estoppel applies.

C. Undermining the Finality of Claim Allowance Orders Will Harm Workers and Employers

Weaver cites no case in which a court has permitted a party with a previous identical case to later maintain a second action. And the case law provides the opposite. *Kingery*, 132 Wn.2d at 169; *Marley*, 125 Wn.2d at 537; *Le Bire*, 14 Wn.2d at 419-20; *Abraham*, 178 Wash. at 163-64. When the second action is the same case with the same fair procedure, L&I agrees there should be "automatic preclusion." Ans. to City 20. Here, the same exposure, the same medical condition, the same relief, and the same procedural protections preclude Weaver's second, duplicate case.

Weaver's theories allowing a second, duplicate case would ultimately hurt workers. Weaver argues that parties should not have to litigate "every modest medical or time loss compensation claim for fear its economic profile might, in the worker's lifetime, radically change." Ans. to City 19. If this Court were to accept this argument, it would open the door to employers urging courts not to honor unappealed decisions allowing claims, and to workers similarly trying to avoid finality. Parties could argue that the court should abandon finality when a claim had originally seemed minor with low financial implications.

Employer challenges to claim finality could be a common scenario. Eighty-two percent of the 94,000 claims opened in 2017 were for medical benefits only, with no other monetary benefits.[14] These workers may have what at first appear to be simple injuries such as muscle strains. An employer might decide not to contest such a claim because medical-only claims have a lower effect on employers' workers' compensation premiums, and in the self-insured context, are less costly. WAC 296-17-855. But under Weaver's theory, the employer could later contest allowance whenever disability increases and expenses mount on the basis

[14] *Comprehensive Annual Financial Report* 4.

that the initial injury was just a strain and seemed inexpensive and would have little fiscal impact.[15]

Not only does this approach depart from decades of case law and the legislative direction that unappealed orders are final, but it will cause strife and uncertainty about the status of workers' compensation claims for all stakeholders.

II. CONCLUSION

Finality benefits workers, employers, and L&I, and they should not have to relitigate allowance cases. This Court should affirm the trial court.

RESPECTFULLY SUBMITTED this 30th day of January 2019.

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[15] Many Washington employers are public, taxpayer-funded entities. These entities and their taxpayers will be negatively impacted by the lack of true finality of final Department and Board decisions.

NO. 96189-1

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL WEAVER, Respondent, v. CITY OF EVERETT and DEPARTMENT OF LABOR & INDUSTRIES, Petitioners.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Supplemental Brief of the Department of Labor & Industries and the City of Everett and this Certificate of Service in the below described manner:

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